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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-102

REUBEN J. KATZ, on behalf of himself and all others similarly situated,

Petitioner,

v.

CARTE BLANCHE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT CARTE BLANCHE CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where, in this action brought as a class action under Section 130 of the Truth-in-Lending Act, the Court of Appeals for the Third Circuit, sitting en banc, has determined, by proper application of all appropriate provisions of Rule 23 of the Federal Rules of Civil Procedure, that this action should not be maintained as a class action as to the liability phase of the case and has remanded the case to the District Court for trial of the liability phase as an individual test case, is this determination inconsistent with any decisions of this Court.

COUNTER-STATEMENT OF THE CASE

On March 15, 1974, the Court of Appeals for the Third Circuit, sitting en banc, determined, pursuant to Rule 23 of the Federal Rules of Civil Procedure, that an individual test case was superior to a class action for the fair and efficient adjudication of the liability issues involved in this action brought under Section 130 of the Truth-in-Lending Act, 15 U.S.C.A. § 1640. The present Petition for Writ of Certiorari is merely the latest in a series of efforts by the Petitioner, Reuben J. Katz (hereinafter "Katz" or "Petitioner"), to avoid this determination of the Court of Appeals en banc by attempting to argue that it is inconsistent with the decision subsequently rendered by this Court in *Eisen v. Carlisle & Jacquelin*, ____ U.S. ____, 94 S.Ct. 2140 (May 28, 1974) [hereinafter "*Eisen*"].

At a conference of counsel held by the District Court on May 31, 1974, the effect of the *Eisen* decision on this action was extensively discussed, and the District Court concluded that there was nothing in *Eisen* which required it to alter or disregard the decision of the Court of Appeals en banc, stating as follows:

> "THE COURT: I'm going forward to dispose of the case as a test case because I see nothing in *Eisen* that says I shouldn't."

Following the District Court's decision that there was no inconsistency between this Court's decision in *Eisen* and the decision of the Court of Appeals en banc in the present case, Katz on June 10, 1974 sought relief from the Court of Appeals in two ways: (1) by filing a Motion for Leave to Petition for Rehearing out of time (hereinafter "Motion re Rehearing"), with the proposed Petition for Rehearing attached thereto; and (2) by filing a Petition for Writ of

Mandamus (hereinafter "Petition for Mandamus") directed against the District Court Judge to whom this action is assigned. The Motion re Rehearing and Petition for Mandamus filed by Katz, both of which were based upon an alleged inconsistency between *Eisen* and the Court of Appeals en banc decision, were referred to the Court of Appeals en banc for decision. Respondent, Carte Blanche Corporation (hereinafter "Carte Blanche"), filed its Response to the Motion re Rehearing on June 14, 1974, and on July 3, 1974 the Court of Appeals en banc entered an Order denying that Motion. The parties thereafter filed briefs on the Petition for Mandamus, which is still pending before the Court of Appeals en banc.

As a result of Katz' ongoing effort to make the decision of the Court of Appeals en banc somehow appear inconsistent with this Court's decision in *Eisen*, the statement of the case contained in Katz' Petition presents a wholly erroneous and distorted view of the nature of this action and the various decisions made by the District Court, the panel of the Court of Appeals, and the Court of Appeals en banc on the question of whether this action should be maintained as a class action. For example, Katz completely misstates the precise holding of the Court of Appeals en banc (see Pages 11-12 of Petition); Katz fails to even mention the basis for the decision of the panel of the Court of Appeals (see Page 12 of Petition), which is helpful to a proper understanding of the subsequent decision of the Court of Appeals en banc; and Katz wholly ignores the decision of the District Court to the effect that there is nothing inconsistent between *Eisen* and the decision of the Court of Appeals en banc (see Page 12 of Petition). Briefly stated immediately below are the facts relating to the nature of this action and each of the four district and appellate court decisions on the question of whether this action should be maintained as a class action.

Katz' Complaint under Section 130 of the Truth-in-Lending Act seeks to recover from Carte Blanche the statutory penalty of not less than $100 for Katz and each member of the alleged class, together with costs of suit and attorneys' fees. Since the alleged class consists of more than 800,000 members, the potential statutory penalty involved in this action is eighty million dollars, which exceeds by many times the net worth of Carte Blanche and would actually bankrupt it (4a).* Katz' Complaint is based upon the allegations that three types of charges paid under certain circumstances by Carte Blanche's cardholders are "finance charges" within the meaning of the Act and that Carte Blanche failed to comply with the disclosure requirements of the Act with respect to such "finance charges".** The three types of charges in question are the following (2-3a):

(1) The annual membership dues.***

(2) The late charges imposed upon the unpaid balances of cardholders' accounts which are in default.

(3) The charges made in connection with Carte Blanche's extended payment plan for airline tickets.

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*References to the Appendix filed by Petitioner will be designated as " a".

**While there has been no decision rendered on the merits of Katz' claims, Carte Blanche has raised substantial defenses to all such claims and submits that it has not violated the Truth-in-Lending Act in any respect.

***On June 5, 1974, the District Court granted partial summary judgment in favor of Carte Blanche on the ground that the annual membership dues is not a "finance charge" within the meaning of the Act. Since all Carte Blanche cardholders are potentially subject to the imposition of late charges if they do not pay their statements on time, the size of the alleged class has not been reduced by the granting of this partial summary judgment.

On January 22, 1971 Katz filed a Motion pursuant to Rule 23(c)(1) asking the District Court to determine that this action could be maintained as a class action. The District Court wrote two Opinions on this Motion, the second of which granted the Motion and resulted in the appeal to the Court of Appeals. *Katz v. Carte Blanche Corporation*, 52 F.R.D. 510 (W.D. Pa. 1971) (Katz I [81a]); *Katz v. Carte Blanche Corporation*, 53 F.R.D. 539 (W.D. Pa. 1971) (Katz II [62a]).

The District Court concluded in Katz I that the requirements of Rule 23(a) were satisfied in the present action but that the provisions of Rule 23(b), which require that the questions common to the class predominate over any questions affecting only individual class members and that the class action be superior to the other available methods of adjudication, "are in need of further exploration and development" (92a). On the question of predominance, Katz I found "problematical the highly personalized nature of the individual question regarding the use to which the defendant's credit card is put", and stated that the District Court was then "undecided as to whether or not that question makes the class unmanageable" (91a).* On the question of superiority, the District Court stated in Katz I that it was "intrigued by the possibility of a test case" as an alternative method of adjudication (91a).

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*The "highly personalized" and "individual" issue to which Katz I referred relates to the provision of the Act that extensions of Credit for business or commercial purposes are not covered by the Act (Section 104, 15 U.S.C.A. §1603). Thus, it must be determined for each member of the alleged class whether he used his card for business or consumer purposes, and this "highly personalized" issue can only be resolved by individual examination of each member and his records.

The "further exploration and development" mandated by Katz I in connection with the questions of superiority and predominance under Rule 23(b)(3) took the form of memoranda submitted by the parties, an evidentiary hearing, and a comprehensive stipulation of the facts. However, all of the foregoing related to the class action determination under Rule 23(c)(1), and none of them was for the purpose of making an inquiry, preliminary or otherwise, into the merits of the action.

Katz II upheld the maintenance of this action as a class action, but expressed serious doubts concerning its decision, observing that "this finding has not been easy in its arrival" and that "(t)he question of the manageability of this action as a class action is a close one" (71a). On the question of manageability, Katz II again emphasized that the issue of consumer versus business purpose was both "individual" and "subjective" with respect to each member of the alleged class, and stated that this issue was "perhaps ultimately fatal" to the maintenance of this action as a class action (67-68a). Katz II certified the granting of class action treatment for appeal pursuant to 28 U.S.C. §1292, and Carte Blanche thereafter filed a Petition for Leave to Appeal, which was granted by the Court of Appeals (78a).

The panel of the Court of Appeals which considered this action rendered its decision on May 22, 1973, holding that the District Court had not abused its discretion in permitting this action to proceed as a class action, at least as to the issues relating to Carte Blanche's liability under the Act. *Katz v. Carte Blanche Corporation*, No. 72-1054, (3rd Cir., May 22, 1973) (Katz III) (Slip Opinion, Page 6). In reaching the holding that the action could be maintained as a class action with respect to the liability issues, the panel relied upon Rule 23(c)(4)(A) which provides that "When appropriate (A) an

action may be brought or maintained as a class action with respect to particular issues . . . ." (Slip Opinion, Page 6).

The panel, however, expressed serious reservations as to whether any subsequent issues in this case (which the panel regarded as damage issues) were appropriate for class action treatment. With respect to the issue of consumer versus business purpose and the issue raised by Carte Blanche's counterclaims against many class members with delinquent balances owing to Carte Blanche, the panel observed that "class proceedings may well be inappropriate for litigating these issues" (Slip Opinion, Page 6). In this regard, the panel of the Court of Appeals, concluded as follows (Slip Opinion, Page 8):

> "[M]erely because class treatment has been afforded litigation of the underlying legal issues does not mean that the issue of damages must be similarly adjudicated."

As noted above, the District Court made its class action determination without any inquiry into the merits of the case. Similarly, the panel of the Court of Appeals which decided Katz III was fully cognizant of the requirement that "the initial determination [under Rule 23(c)(1)] must be made without benefit of actual litigation of the case" (Slip Opinion, Page 3).

Pursuant to Carte Blanche's Petition for Rehearing, the Court of Appeals en banc vacated Katz III and granted a rehearing before the Court en banc. The Court of Appeals en banc rendered its decision on March 15, 1974 [*Katz v. Carte Blanche Corporation*, 496 F.2d 747 (3rd Cir. 1974) (Katz IV) (1a)], reversing the District Court's decision in Katz II. In Katz IV, the Court of Appeals en banc concluded, *inter*

alia, that an individual test case was superior to a class action for adjudicating the liability issues in this action. In this regard, the precise holding of the Court of Appeals en banc in Katz IV was as follows (29a):

> "We have concluded that the order appealed from must be reversed because the superiority finding was in error."*

Further, the Court of Appeals en banc expressed the same grave reservations that the panel had enunciated in Katz III as to the suitability of this action proceeding as a class action as to any other issue (29-32a).

Thus, when the decisions by the panel in Katz III and the Court of Appeals en banc in Katz IV are read together, the conclusion is inescapable that the Court of Appeals en banc has decided that this case should not proceed as a class action on the liability phase thereof because class action procedure is not the superior method for the fair and efficient adjudication of this controversy. At the same time, it is also clear that Judge Teitelbaum in Katz I and II, the panel in Katz III and the Court of Appeals en banc in Katz IV have all agreed that the so-called damage phase of this case is not appropriate for class action treatment.

Nevertheless, at this stage of these proceedings, the result is that the Court of Appeals en banc has remanded the case to the District Court for further proceedings in accor-

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*The Court of Appeals en banc reviewed the District Court's Rule 23(b)(3) superiority determination in light of six pertinent interests affected by the determination and the issues involved in the action (24a), and concluded that a class action was not the superior method for the adjudication of the liability issues in this case. Carte Blanche presented several other reasons why this case should not be allowed to proceed as a class action. However, in view of the decision rendered by the Court of Appeals en banc, it was not necessary to consider these other reasons.

dance with its Opinion. Those proceedings will include going forward with a complete disposition of the liability phase of this case. There will be no so-called mini hearing, but rather a full and complete consideration of the liability phase of this controversy subject to all of the provisions of due process which are required to be observed in such a proceeding. At the same time, the Court of Appeals en banc in Katz IV has left to the sound discretion of the Trial Judge, in accordance with the specific provisions of Rule 23, the question of whether, if liability is found, any further proceedings under Rule 23 on the merits of any remaining issues in the case would be appropriate. While the conclusion to be reached in this regard has been foretold by the previous considerations thereof by the Trial Judge, the panel, and the Court of Appeals en banc, the present status of this case is that, consistent with the specific provisions of Rule 23(c)(1) and Rule 23(c)(4)(A), the Trial Judge may consider at some future time if appropriate the question of whether any other phase of this case should proceed as a class action. Accordingly, the Trial Judge has correctly decided that he intends to "dispose of the case as a test case" in accordance with the mandate of the Court of Appeals in Katz IV.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS EN BANC DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT

At Pages 13-17 of his Petition, Katz argues that the decision of the Court of Appeals en banc conflicts with the decisions of this Court in *Eisen, supra,* and *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1972), to the effect that the question of whether an action may be maintained as a class action must be resolved before a decision on the merits.

The answer to this position is obvious. The argument made by Katz simply ignores the fact that in the present case the appropriateness of maintaining this action as a class action has been determined before any such decision on the merits. The District Court certified this action as a class action before any evidence was received or any determination was made as to the merits of the action. Similarly, the panel of the Court of Appeals specifically observed that "the initial determination [under Rule 23(c)(1)] must be made without benefit of actual litigation of the case" (Slip Opinion, Page 3). The panel then determined, without reference to the merits of the case, that the liability issues in this action are "readily amenable to disposition by class suit" (Slip Opinion, Page 6), but expressed doubts that the damage phase of the case would be appropriate for class treatment. The Court of Appeals en banc reversed on the ground that an individual test case would be superior to a class action for adjudication of the liability phase of the case, while expressing the same doubts as the panel with respect to whether the damage phase of the case should be treated as a class action. It is clear that the Court of Appeals based its decision upon the criterion of superiority under Rule 23(b)(3), and not upon its view

of the merits of Katz' claims. Thus, the question of whether this action may be maintained by a class action has been ruled upon and reviewed on three occasions, and on each of those occasions the decision has been made on the basis of the criteria set forth in Rule 23 and not upon any inquiry, preliminary or otherwise, into the merits of the case.

We submit that a careful reading of this Court's decision in the *Eisen* case demonstrates that it is inapposite to the case at bar and that it in no way affects the premises upon which the Court of Appeals en banc based its decision in Katz IV. Petitioner has simply misinterpreted the *Eisen* case.

Eisen stands, *inter alia*, for the proposition that a preliminary determination of the merits of the action may not be made in order to determine whether the action may be maintained as a class action or for the purpose of determining which of the parties should bear the cost of notice. The important reason for the *Eisen* holding is as follows (84 S. Ct. at p. 749):

> "[A] preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant."

The differences between the facts in *Eisen* and those in the present case are readily apparent. The present case involves no preliminary determination of the merits discussed in *Eisen*. In the present case, a full scale trial on the issue of liability is contemplated and certainly the traditional rules and procedures will be applicable to this trial. Furthermore, as previously pointed out, the Court of Appeals en banc has not postponed determination of the appropriateness of this

case as a class action on the issue of liability. The class action determination has been made finally in that regard.

At the same time, consistent with the provisions of Rule 23(c)(1)and Rule 23(c)(4)(A), the Court of Appeals decision in Katz IV has left to the sound discretion of the Trial Judge the question of whether any other part of this case should be considered for class action treatment. Such further consideration is specifically contemplated by the foregoing subdivisions of Rule 23 and is in no way inconsistent with this Court's decision in *Eisen*.

The present case is equally consistent with this Court's decision in *American Pipe*, since, as discussed above, the Court of Appeals en banc has made the class action determination required by Rule 23(c)(1). In addition, it should be pointed out that *American Pipe* was decided prior to the decision of the Court of Appeals en banc and was specifically cited and discussed by the Court of Appeals en banc in support of its decision in Katz IV (25a-26a). Further, both *Eisen* and *American Pipe* were concerned with delays in the class action determination on the ground that they operated *unfairly* in favor of the potential class members and *against the defendant*. Even assuming that these decisions had any application to the facts of the present case, which clearly they do not, it is extremely doubtful that Katz, as the representative of the members of the alleged class in the present case, would be in any position to rely upon them.

Thus, the proceedings in this case have demonstrated complete consistency both with all of the provisions of Rule 23 and this Court's Opinions in *Eisen* and *American Pipe*. The question of class determination has in no way been postponed nor is there any plan to have a preliminary determination of the merits of the case prior to making a class action determination. On the contrary, careful consideration has

been given on four separate occasions to the question of the appropriateness of this case for class action treatment. A decision has been finally made that at this stage of these proceedings, class action treatment of the liability phase of this case is inappropriate because it is not the superior method for the fair and efficient adjudication of the controversy. While these same four decisions have each expressed grave reservations concerning whether the so-called damage phase of this case would be appropriate for class action treatment, a final decision in this regard is not necessary at this stage of these proceedings. Therefore, consistent with the specific provisions of Rule 23(c)(1) and Rule 23(c)(4)(A), if a final determination is necessary on this question, that determination has been left to the Trial Judge at some future time. Under all of these circumstances, no question is presented which is worthy of consideration by this Court on certiorari.

II. THE COURT OF APPEALS EN BANC HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Katz contends at Pages 18-20 of his Petition that, while *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) held mutuality of estoppel to be unessential and applied the concept in a situation wherein it was used defensively, it did not approve the offensive use of collateral estoppel. Katz thereupon contends that this Court should grant certiorari to consider this "important question."

We submit that a review of the entire decision in Katz IV leads inescapably to the conclusion that the Court of Appeals en banc would have held that this action should not proceed as a class action even without any consideration of collateral estoppel. The Court of Appeals en banc considered all of the interests and issues involved in the present action and in class actions generally in the course of reaching its decision that the class action was not the superior method of proceeding. One of these factors was that, under *Blonder-Tongue, supra*, and *Bruszewski v. United States*, 181 F.2d 419 (3rd Cir.), *cert denied*, 340 U.S. 865 (1950), a judgment for Katz in an individual test case would have a collateral estoppel effect against Carte Blanche. The Court of Appeals en banc also observed that Carte Blanche was not seeking the benefit of mutual estoppel which would result from a class action certification in this case, being content instead to rely upon the stare decisis effect of a judgment in its favor in an individual case. As noted above, these two factors and other important considerations ultimately led the Court of Appeals en banc to reverse the panel's conclusion that class action treatment was appropriate and to conclude that class action treatment was not the superior method of proceeding in this case.

In any event, it is clear that the matter of the offensive use of collateral estoppel is simply not an issue in this case at the present time. The Court of Appeals en banc has concluded that a decision against Carte Blanche in an individual test case on the liability phase of this case would have a collateral estoppel effect. Carte Blanche is not before this Court seeking a review of this conclusion. Clearly, Katz is not in a position to seek appellate review of this conclusion since it is favorable to the members of the alleged class whose interests Katz purports to represent. *In re Michigan-Ohio Building Corp.*, 117 F.2d 191 (7th Cir. 1941). Even assuming that the matter of mutuality of estoppel is regarded as an "important question of federal law which has not been, but should be, settled by this Court," the present case is clearly not the proper occasion for the Court to consider that question since it is not crucial to the Court of Appeals en banc decision and there is no issue between the parties in the present case with respect to that question. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra* at 320 (1970); *M.C. & L.M. Railway Co. v. Swan*, 111 U.S. 379 (1883); *Lord v. Veazie*, 49 U.S. 251 (1850).

CONCLUSION

For all of the reasons stated above, Respondent respectfully submits that no issue is presented in this case which is worthy of the grant of certiorari by this Court. Thus, Respondent respectfully prays that Katz' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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